



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWA/155639

PRELIMINARY RECITALS

Pursuant to a petition filed February 21, 2014, under Wis. Admin. Code §HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance (MA) the matter was set for a hearing. The parties agreed that they wished the issue below to be decided on legal briefs prior to a hearing. The parties submitted those briefs according to an agreed upon schedule and this decision follows. The petitioner has waived MOUA deadlines.

The issue for determination is whether the Include, Respect, I Self-Direct (IRIS) program will pay for double staffing.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Robert Pledl
1110 North Old World Third St #215
Milwaukee, WI 53203

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Attorney Jessica Hutson Polakowski
Reinhart Boerner Van Deuren s.c.
22 E. Mifflin Street
Suite 600
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. Petitioner is enrolled in the IRIS program. At some point during this enrollment, he requested that the IRIS program fund additional Supportive Home Care (SHC) hours.
3. On January 8, 2014 the IRIS agency issued a notice of action to petitioner stating that it was denying the request for additional SHC. Petitioner appealed therefrom.
4. The definition of “double staffing” is agreed upon to be “providing the same or similar care services at the same time.”

DISCUSSION

The IRIS program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. It is a self-directed personal care program.

The federal government has promulgated 42 C.F.R. §441.450 - .484 to provide general guidance for this program. Those regulations require that the Department of Health Services' (DHS) agent must assess the participant's needs and preferences (including health status) as a condition of IRIS participation. *Id.*, §441.466. The DHS's agent must also develop a service plan based on the assessed needs. Further, “all of the State's applicable policies and procedures associated with service plan development must be carried out ...” *Id.* §441.468.

In this case we are dealing with a request for additional SHC, and the parties have agreed that the legal issue of whether the IRIS program will pay for double staffing is the first question to answer. I find that the IRIS program will not pay for double staffing.

First, the petitioner argues that the IRIS policy §6.4C, which was used in part by the agency as the basis for denying petitioner's request for SHC, does not apply here because it only applies to private duty nursing (PDN). Policy §6.4 and 6.4C were discussed at length in the parties' briefs. Using the general rules of construction, I find that this policy relates solely to the possibility of double staffing when it relates to PDN services. See *State ex rel. Kalal v. Circuit Court for Dane County*, 271 Wis.2d 633, ¶46, 681 N.W.2d 110, 2004 WI 58 (Wis. May 25, 2004). However, as that policy describes, the double staffing would occur, if medically necessary, between PDN services and MAPC services. IRIS policy §6.4C. It also states that “IRIS waiver funds would not cover double staffing if medically necessary as it is a service covered by the Medical Assistance Card.” *Id.* Thus, I find that this policy describes how double staffing with PDN is “allowable” within IRIS, even if IRIS does not pay for it. I further find that these PDN policies do not answer the ultimate issue here because it is undisputed that petitioner does not receive PDN.

Second, the petitioner argues that because IRIS has not explicitly stated that double staffing is prohibited elsewhere, it can be allowed. The agency cites to Wis. Adm. Code §DHS 104.02(1) as additional basis for the denial here. Chapter DHS 104 relates to MA recipient's rights and duties. The subsection cited by IRIS provides that MA recipients are not to seek duplication of services, in that an MA recipient may not seek the same or similar services from more than one provider, except for a second medical opinion for selected elective surgical procedures. See Wis. Adm. Code §DHS 104.02(1). This notion that MA recipients cannot receive duplication of services is not limited to the IRIS program. Chapters DHS 101 to 108 were promulgated for the purpose of administering the MA program in Wisconsin and apply to all recipients of MA, all providers of MA and all persons engaged in the administration of MA. See Wis.

Adm. Code §DHS 101.01-.02. Included in those chapters is the requirement that MA provide services which are medically necessary. See Wis. Adm. Code §DHS 107.01(1). “Medically necessary” means a MA service that is:

- (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
- (b) Meets the following standards:
 1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
 2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider and the setting in which the service is provided;
 3. Is appropriate with regard to generally accepted standards of medical practice;
 4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
 5. Is of proven medical value or usefulness and, consistent with s. [DHS 107.035](#), is not experimental in nature;
 6. **Is not duplicative with respect to other services being provided to the recipient;**
 7. Is not solely for the convenience of the recipient, the recipient's family or a provider;
 8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
 9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Adm. Code §DHS 101.03(96m)(emphasis added).

The DHS has ruled on duplication of services in previous Final Decisions. Deputy Secretary Susan Reinardy held in *DHA Final Decision No. MPA-37/80183*, a speech therapy appeal, that “the deciding factor in whether services are duplicative is not the [therapy] technique utilized by the therapists, but the goals and outcomes being addressed by the therapists.” *Id.* at 2. It does not matter if one provider addresses group activities with peers and the other one-on-one activities with an adult. A requested service duplicates “an existing service if the intended outcome of the two services is substantially the same.” *Id.* at 3. That Final Decision specifically rejected additional therapy because the recipient “‘needs’ more intense services than the school provides.” The holding rests on the principle that “Medicaid may not pay for two services if both services have the same intended outcome or result with respect to the medical condition the services are intended to address.” *Id.* at 4. The Deputy Secretary has made it clear that the “intended outcome” test must be read broadly. In *DHA Final Decision No. MPA-49/82886*, a decision reiterating the principle laid down in *MPA-37/80183*, she pointed out that the intended outcome was the same if both therapists were working to develop similar functional skills.

Based on the foregoing, it is clear that MA does not pay for duplicative services. I find that the definition of “double staffing” as “providing the same or similar care services at the same time” equates to a duplication of services. Accordingly, I conclude that the IRIS program will not pay for double staffing.

CONCLUSIONS OF LAW

The IRIS program will not pay for double staffing.

THEREFORE, it is

ORDERED

The petition for review herein is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

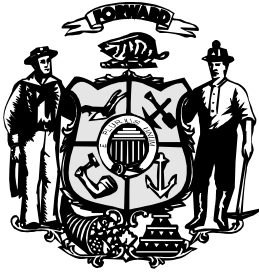
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 18th day of July, 2014

\sKelly Cochran
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on July 18, 2014.

Bureau of Long-Term Support
Attorney Robert Pledl
Attorney Jessica Hutson Polakowski